Sumarni v Yow Bing Kwong & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C–02–811 OF 2002
JAMES FOONG, ABDULL HAMID EMBONG AND ZAINUN ALI JJCA
5 OCTOBER 2007

Tort — Damages — Road accident — Loss of future earnings — Whether plaintiff fulfilled statutory prerequisite under s 28A of the Civil Law Act 1965

Tort — Damages — Road accident — Loss of future earnings — Whether plaintiff able to earn in the future — Whether plaintiff suffered real substantial assessable loss

Tort — Damages — Road accident — Loss of earning capacity — Whether plaintiff entitled to loss of earning capacity — Whether plaintiff would face real or substantial risk in her earning capacity in the future

The plaintiff was an Indonesian engaged as a domestic help in Malaysia. Due to her injuries as a result of a motor accident, the plaintiff claimed that she was unable to work. Subsequently, her work permit was not renewed and she lost her job. The plaintiff claimed, inter alia, compensation for loss of future earnings as permitted under s 28A(2)(d)(i) of the Civil Law Act 1956. The trial judge in allowing some of her other claims against the defendants, dismissed her claim for loss of future earnings. The plaintiff's appeal to the High Court and dismissed and she appealed to the Court of Appeal.

Held, allowing the appeal in part:

(1) (per **James Foong JCA**, **Abdull Hamid Embong JCA** and **Zainun Ali JCA** concuring) The plaintiff cannot justify non-compliance of a statutory prerequisite simply because there was an objection raised by the defendant that there was no proof that it was complied with by the plaintiff. Legislation demands that the plaintiff must fulfil certain prerequisites before she can be successful in her claim for loss of future earnings and failure to fulfill these were fatal to the plaintiff's claim (see para 12).

(2) (per **James Foong JCA**, **Abdull Hamid Embong JCA** and **Zainun Ali JCA** concuring) For loss of future earnings, apart from the need to prove that she was in good health, the plaintiff must also show that it was 'but for the injury and that he (she) was receiving earnings by his (her) own labour or other gainful activity before he (she) was injured' (see para 13).

(3) (per **James Foong JCA**, **Abdull Hamid Embong JCA** and **Zainun Ali JCA** concuring) Even if the plaintiff has proved that she was in good health but for the injury, she still had to prove that because of this she is not able to earn in the future. On this requirement, case law demands that there must be evidence of real substantial assessable loss ie, loss that is capable of assessment at the date of trial, and this must be proved by evidence, not by mere speculation and it should not be remote (see para 14).

(4) (per**James Foong JCA**, **Abdull Hamid Embong JCA** and **Zainun Ali JCA** concuring) It was explicit that before an award of loss of earning capacity can be entertained, there must be evidence to show that the plaintiff will face a real or substantial risk in her earning capacity being affected in the future due to the disability she sustained from the motor accident (see para 23).

(5) (per **Abdull Hamid Embong JCA** concuring)) As was explained by learned counsel for the plaintiff, the defendants had earlier filed an appeal against the finding of liability by the learned sessions judge, even before the plaintiff could file his appeal on the quantum awarded. Under that situation the plaintiff may rightly act under O 55 r 3 of the Rules of High Court 1980 and file a cross appeal within seven days, which was duly done (see para 27).

(6) (per **Abdull Hamid Embong JCA** concuring)) In essence a cross appeal although tagged to the defendants' initial appeal operates as an independent appeal and the appellate court may rehear both the appeals together (see para 28).

[Bahasa Malaysia summary

Plaintif adalah seorang warganegara Indonesia yang bertugas sebagai pembantu rumah di Malaysia. Diakibatkan kecederaannya yang disebabkan oleh kemalangan motosikal, plaintif mendakwa bahawa beliau tidak boleh bekerja. Seterusnya, surat kebenarannya tidak diperbaharui dan beliau kehilangan kerjanya. Plaintif menuntut, antara lain, pampas an untuk kehilangan pendapatan akan datang seperti mana dibenarkan di bawah s 287A(2)(d)(i) Akta Undang-Undang Sivil 1956. Hakim bicara dalam membenarkan sebahagian tuntutan yang lain terhadap defendan, telah

menolak tuntutannya untuk kehilangan pendapatan akan datang. Plaintif merayu kepada Mahkamah Tinggi dan telah ditolak dan plaintif merayu ke Mahkamah Rayuan.

Diputuskan, membenarkan sebahagian rayuan:

(1) (oleh **James Foong HMR**, **Abdull Hamid Embong HMR** dan **Zainun Ali HMR** bersetuju) Plaintif tidak dapat menjustifikasikan ketakpatuhan pra syarat statutori hanya kerana terdapatnya bantahan yang dibangkitkan oleh defendan bahawa tidak terdapatnya bukti bahawa ianya telah dipatuhi oleh plaintif. Tuntutan undang-undang bahawa plaintif mestilah memenuhi prasyarat tertentu sebelum beliau boleh Berjaya dalam tuntutannya untuk kehilangan pendapatan akan datang dan kegagalan untuk memenuhinya adalah membawa keburukan kepada tuntutan plaintif (lihat perenggan 12).

(2) (oleh **James Foong HMR**, **Abdull Hamid Embong HMR** dan **Zainun Ali HMR** bersetuju) Bagi kehilangan pendapatan akan datang, selain daripada perlunya untuk membuktikan bahawa beliau dalam kesihatan yang baik plaintif juga mestilah menunjukkan bahawa ianya adalah 'tetapi bagi kecederaan dan bahawa beliau telah menerima pendapatan melalui titik peluhnya sendiri atau aktiviti menguntungkan yang lain sebelum beliau mengalami kecederaan' (lihat perenggan 13).

(3) (oleh **James Foong HMR**, **Abdull Hamid Embong HMR** dan **Zainun Ali HMR** bersetuju) Walaupun jika plaintif telah membuktikan bahawa beliau dalam kesihatan yang baik tetapi bagi kecederaan, beliau masih perlu untuk membuktikan bahawa kerana ini, beliau tidak dapat memperoleh pendapatan di masa akan datang. Atas syarat ini, kes perundangan memerlukan bahawa perlunya bukti kehilangan besar yang sebenar yang boleh ditaksir iaitu kehilangan bahawa ianya boleh ditaksirkan pada tarikh perbicaraan, dan ini mestilah dibuktikan melalui keterangan, bukan hanya melalui spekulasi dan ianya tidak seharusnya terpencil (lihat perenggan 14).

(4) (oleh **James Foong HMR**, **Abdull Hamid Embong HMR** dan **Zainun Ali HMR** bersetuju) Ianya adalah eksplisit bahawa sebelum award terhadap kehilangan keupayaan memperoleh pendapatan boleh dilayan, mestilah terdapatnya bukti untuk menunjukkan bahawa plaintif akan menghadapi risiko yang sebenar atau besar dalam keupayaannya memperoleh pendapatan yang memberikan kesan buruk di masa akan datang akibat daripada ketidak upayaan yang dialaminya daripada kemalangan motosikal (lihat perenggan 23).

(5) (oleh **Abdull Hamid Embong HMR** bersetuju) Sepertimana yang telah dijelaskan oleh peguam terpelajar plaintif, defendan awalnya telah

memfailkan rayuan terhadap keputusan liabiliti oleh hakim mahkamah sesyen yang bijaksana, walaupun sebelum plaintif boleh memfailkan rayuannya atas kuantum yang diberikan. Di bawah keadaan tersebut plaintif mungkin benar bertindak di bawah A 55 k 3 Kaedah-Kaedah Mahkamah Tinggi 1980 dan memfailkan rayuan silang dalam tujuh hari yang mana telah dilakukan (lihat perenggan 27).

(6) (oleh **Abdull Hamid Embong HMR** bersetuju) Intipati rayuan silang walaupun ditandakan kepada rayuan utama defendan bertindak sebagai rayuan bebas dan mahkamah rayuan boleh mendengar semula kedua-dua rayuan bersama (lihat perenggan 28).]

Notes

For cases on road accident, see 12 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 240–243.

Cases referred to

Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156 (refd)
Looi Gnan Peng v Bay Tong Hai [2005] 1 CLJ 685 (refd)
Marappan & Anor v Siti Rahmah bte Ibrahim [1990] 1 MLJ 99 (refd)
Ngooi Ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30 (refd)
Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad [1985] 1 MLJ 50 (refd)
Yang Yap Fong & Anor v Leong Pek Hoon & Anor [1987] CLJ (Reprint) 419; [1987] 2 MLJ 201 (refd)

Legislation referred to

Civil Law Act 1956 s 28A(2)(d)(i)
Rules of High Court 1980 O 55 r 3

Appeal from: Civil Appeal No 12–18 of 2001 (High Court, Temerloh)

S Sivanesan (S Siva & Co) for the appellant.
Wan Kuzaini Azli bin Wan Abu Bakar (VP Nathan & Partners) for the respondents.

James Foong JCA (delivering judgment of the court):

INTRODUCTION

[1] Since this appeal originated from the subordinate court, in order to avoid confusion as to the description of parties before us, I shall refer to them as they were described in the court of first instance.

[2] The plaintiff is, and was at all material time, an Indonesian national. Before she was involved in a motor accident on 31 January 2000 (the motor accident), she was engaged as a domestic help in this country. She was what we normally call, an 'Indonesian maid'. She was paid a salary of RM350 per month by her Malaysian employer. Her work permit issued by the Malaysian Immigration Department for this position was from July 1999 to July 2000. Due to her injuries suffered as a result of the motor accident where the defendants were held 90% liable with her contributing 10%, the plaintiff claimed that she was unable to work. Her employer had stopped paying her salary immediately after the accident. However, he provided her with food and shelter until her work permit expired. Thereafter, it was not renewed and the plaintiff lost her job. The reason advanced by her previous employer for not renewing her work permit is that she was physically incapable of performing her duties as a domestic help after the motor accident. As a result of this, the plaintiff now claims that she should be entitled to compensation for loss of future earnings amounting to RM67,200 as permitted under s 28A(2)(d)(i) of the Civil Law Act 1956 ('the Act'). This is the main contention in her appeal before us after the sessions court granted her only a sum of RM2,100 for loss of earnings and the High Court affirmed this amount on appeal. The courts arrived at this sum by using a multiplicand of six months on a multiplier of RM350. The rational advanced for the use of six months as the multiplicand was that the plaintiffs work permit expired six months from the date of the accident. Aside from this award for loss of earnings, the plaintiff was also granted special damages as well as general damages for pain and suffering. Since there is no dispute on these awards, there is no necessity to mention them in detail here.

[3] As the principle issue of this case involves the loss of future earnings, it is appropriate to reproduce s 28A(2) of the Act which deals with this subject.

Section 28A (2) In assessing damages under this section —

(a) no damage shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;

(b) if the plaintiff's expectation of life has been reduced by the injury, the Court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;

(c) in awarding damages for loss of future earnings the Court shall take into account:

(i) that in the case of a plaintiff who has attained the age of fifty-five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the

plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;

(ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;

(d) in assessing damages for loss of future earnings the court shall take into account that —

(i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and

(ii) in the case of any other person who was of the age range extending between thirty-one years and fifty-four years at the time when he was injured, the number of years 'purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

[4] Since the plaintiff was 27 years of age at the time of the motor accident, her counsel submitted that 16 years purchase should be the multiplier with a multiplicand of RM350 per month. This would return an aggregate of RM67,200 for loss of future earnings.

REASONS OF THE HIGH COURT

[5] In rejecting this claim for loss of future earnings based on the method of calculation as submitted, the High Court proffered these reasons:

Di dalam kes sekarang, responden merupakan seorang warganegara Indonesia yang datang ke negara ini bekerja sebagai pembantu rumah di atas permit kerja yang dikeluarkan oleh Kerajaan Malaysia. Pendapatan bulanannya ialah RM350. Hakim mahkamah sesyen dalam kes ini telah mengawadkan kehilangan pendapatan masa hadapan kepada responden hanya bagi tempoh enem bulan selepas tarikh kemalangan iaitu tempoh yang sama permit kerja beliau akan tamat. Bagi seseorang 'pendatang' beliau hanya boleh bekerja dan mendapatkan pendapatan di negara ini hanya dengan adanya satu permit kerja yang sah yang dikeluarkan oleh Kerajaan. Permit kerja tersebut tamat tempoh sahlakunya dan perlu diperbaharui setiap tahun. Tanpa satu permit kerja yang sah, seseorang 'pendatang' tidak boleh bekerja di negara ini dan oleh itu tidak akan mendapat

pendapatan yang sah. Dalam kes sekarang, kemalangan berlaku pada 31 Januari 2000 manakala permit kerjanya berakhir pada bulan Julai 2000 ie, enam bulan selepas tarikh kemalangan. Hakim mahkamah sesyen telah mengawadkan 'kehilangan pendapatan' sebanyak RM350 x 6 bulan = RM2,100. Soalnya di sini sama ada responden layak dan berhak diawadkan 'kehilangan pendapatan' selepas tempoh tersebut iaitu selepas permit kerja beliau tamat. Seperti yang telah diputuskan di dalam kes Ngooi Ku Siong. kehilangan tersebut mestilah merupakan 'real assessable loss' dan hendaklah dibuktikan melalui keterangan yang sah, bahawa responden 'might be thrown out of worth altogether at some future date, bukannya sekadar secara spekulasi. Di dalam kes sekarang, responden tidak berjaya membuktikan 'kehilangan' tersebut selepas tamat tempoh permit kerjanya di negara ini. Peluang sama ada permit kerja beliau diperbaharui atau tidak bergantung kepada banyak faktor. Ianya boleh dikatakan terlalu 'remote' atau spekulatif Juga tiada sebarang keterangan sama ada responden mempunyai sebarang pekerjaan tetap yang menunggunya di Indonesia bila beliau kembali ke negara asalnya kelak. Oleh itu mahkamah ini bersetuju dan bersependapatan dengan keputusan Hakim Mahkamah Sesyen yang mengawadkan responden bagi 'kehilangan pendapatan' hanya bagi tempoh enam bulan semasa permit kerjanya masih berkuatkuasa. Mahkamah ini juga berpendapat dan memutuskan bahawa perayu tidak layak diawadkan gantirugi bagi 'kehilangan pendapatan' selepas tempoh tersebut, kerana kehilangan pendapatannya bukanlah satu perkara yang 'real' dan ianya lebih merupakan satu kehilangan spekulatif sahaja.

PHYSICAL INJURIES OF THE PLAINTIFF

[6] Before I proceed to discuss this claim of the plaintiff, it is necessary to disclose the physical injuries sustained by the plaintiff as a result of the motor accident. The report from the doctor of Hospital Mentakab, Pahang who examined the plaintiff on 5 April 2001 states:

Injuries

(1) Open fracture of the left tibia/fibula;

(2) Multiple abrasions;

(3) Cerebral concussion.

Residual deformities

(1) Scars over the left leg.

(2) Painful left tibia bone and left ankle joint.

(3) Reduced range of movement of left ankle joint.

(4) Deformity over the left leg and foot.

(5) Limping gait on walking.

(6) Unable to stand for longer period using left leg.

(7) Psychological trauma.

(8) Epigastric pain due to stress ulcer and analgesic (pain killer) induced gastritis.

(9) Left tibia shortened by about 2 cm.

Comments

(1) All the scar marks and graft are permanent.

(2) The wasting of left leg and foot are due to disuse of limb and may be alleviated by intensive exercise regime.

(3) Painful left ankle joint is secondary to traumatic degenerative osteoarthritis and is a natural consequence of the fracture and left tibial malunion. The limp are (is) permanent.

(4) She may develop other secondary osteoarthritis over the other joint later due to unequal load distribution.

(5) Pain over left tibia and left tibia non-union will need further operation ie, plate with bone graft. She will again bear the traumatic operation and the cost of treatment.

(6) Deformity of left foot, pain on left shin may prevent her from long hours (of) standing and walking.

(7) Frequent headache(s) and stomach ache(s) are due to stress ulcer. It arise consequence of the stress due to accident. Frequent taking medication to relieve the pain may also cause the stomach ulcer.

(8) She will have to bear the psychological trauma at present and the future.

PLAINTIFFS ARGUMENT

[7] Counsel for the plaintiff has argued before us that both the Judges of the Sessions Court and High Court had erred in not awarding the plaintiff her entitlement as provided by statutory law when she had adduced sufficient evidence to satisfy all the pre-requisites in s 28A(2)(c)(i) of the Act. These pre-requisites are 'unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before the injury', the award for loss of future earnings should be allowed. It was submitted that the plaintiff was gainfully employed at RM350 per month before the motor accident and it was due to the injuries she suffered as a result of this accident that her work permit was not renewed by her former employer leading to the loss of her job. For this, she should be entitled to RM67,200 for loss of future earnings. Further, plaintiffs counsel pointed out that the plaintiffs loss of future earnings is real

and is not speculative or a fanciful thought. She is no longer able to work as a domestic help. In conclusion, plaintiffs counsel requested this court to award her a sum for loss of earning capacity in the event that the plaintiffs claim for loss of future earnings is refused.

ANALYSIS

Loss of earnings

[8] It is necessary at the outset to clarify the meaning of loss of earnings and loss of future earnings which were used interchangeably in both the plaintiffs pleadings and the judgment of the High Court. It is my view that the former is classified as special damages and the latter as general damages, see *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30. Loss of earnings is normally considered as a pre-trial loss. This is the actual amount of earnings lost by a plaintiff as a result of an accident caused by a defendant. In this instance, the plaintiff was not paid by her employer immediately after the accident though her contract with this employer has another six months to run. Instead she only received free board and lodging from the time she was discharged from hospital to the time when her work permit expired. This was for a period of six months. She has claimed for this loss of earnings in her statement of claim, and I believed that she was duly compensated a sum of RM2,100 for this category of loss by the Sessions Court and subsequently confirmed by the High Court. In my opinion, the courts below were correct in allowing this amount to the plaintiff for this category of loss.

Loss of future earnings

[9] For loss of future earnings, it is a post-trial loss. It was decided by the Federal Court in *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30 that:

> Future loss of earnings or loss of prospective earnings are awarded for real assessable loss ie, loss that is capable of assessment at the date of the trial. It must be proved by evidence and not by mere speculation....there must be evidence of a real and substantial loss which must not be remote and speculative.

[10] This aside, this court's decision in *Looi Gnan Peng v Bay Tong Hai* [2005] 1 CLJ 685, demands that all 'elements' in s 28A of the Act should be proved. We expressed it in this form:

> With respect we are of the view that the years purchase is only one aspect of s. 28A in relation to claim for loss of future earnings. One of the other elements is that 'damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury'.

A On perusal of the evidence adduced we are in agreement with learned counsel for the respondent that none of the witnesses called by the appellant including the appellant herself testified on her overall health condition. No doubt in the medical reports it was stated that her general condition was satisfactory or good. But that could only refer to her condition after the accident and not on her overall health.
B A simple question to the medical doctors called as witnesses on her overall health condition could have resolved the doubt. Since that was not done we are of the view that one element required for a successful claim remained unproved.

C **[11]** Realizing that the plaintiff had not adduced evidence to prove that she was in good health but for the injury, like what happened to the plaintiff in *Looi Gnan Peng v Bay Tong Hai*, Mr S Sivanesan, plaintiff's counsel, in an attempt to carry out remedial measures, submitted that since the defendants did not take issue on this matter during the hearing at first instance, it must
D be presumed that the plaintiff was in good health at the material time but for the injury. He cited the case of *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99 to support this proposition.

E **[12]** I have perused the Federal Court judgment of *Marappan & Anor v Siti Rahmah bte Ibrahim* and found no such principle set. All that was said in the last paragraph of the judgment of that case is 'that the court should not make any deduction for living expenses under that subsection of s 28 A of the Act as there was no proof or admission in this case as to what the actual living
F expenses of the plaintiff were at the time when she was injured'. There, the Federal Court was dealing with the contention of the defendant that deduction should be made according to the plaintiffs living expenses. But it was ruled that since there was no proof or admission of actual living expenses of the plaintiff at the time when she was injured, the trial Judge was correct
G in concluding that no deduction as claimed by the defendant should be made for living expenses under s 28A(2)(c)(iii) of the Act. Borrowing this rationale of the Federal Court, the plaintiff is now saying that there is no necessity to prove one of the statutory requirements regarding good health since the defendant has raised an objection that this prerequisite has not been fulfilled
H by the plaintiff. In short, the fulfillment of this prerequisite was implied. This kind of reasoning is absurd. The rational of the Federal Court in *Marappan & Anor v Siti Rahmah bte Ibrahim* is misapplied. The plaintiff cannot justify non-compliance of a statutory prerequisite simply because there is an objection raised by the defendant that there is no proof that it was
I complied with by the plaintiff. Legislation demands that the plaintiff must fulfill certain prerequisites before she can be successful in her claim for loss of future earnings and failure to fulfill these are fatal to the plaintiffs claim. Here, obviously, the plaintiff has failed to tender any evidence to show her overall health condition but for the injury and is attempting to reverse the

burden of proving this onto the defendant for raising it. This approach not only lacks merit but also goes against fundamental principles of law. This must be rejected.

[13] Apart from the need to prove that she was in good health, the plaintiff must also show that it was 'but for the injury and that he (she) was receiving earnings by his (her) own labour or other gainful activity before he (she) was injured'. In respect of the latter ie, was receiving earnings by her own labour or other gainful activity before she was injured, I think the plaintiff has successfully satisfied this. But in respect of the former ie, 'but for the injury', there must be evidence to show that but for the injury she is not able to earn in the future. This qualification of not being able to earn in the future must be read as a consequence to 'but for the injury' to give full effect to s 28A(2)(c) of the Act which is basically intended to cater for loss of future earnings as a result of personal injury.

[14] So even if the plaintiff has proved that she was in good health but for the injury, she still has to prove that because of this she is not able to earn in the future. On this requirement, case law demands that there must be evidence of real substantial assessable loss ie, loss that is capable of assessment at the date of trial, and this must be proved by evidence, not by mere speculation and it should not be remote, *Ngooi Ku Siong & Anor v Aidi Abdullah.*

[15] To evaluate what amounts to real substantial assessable loss which must not be remote and speculative, it is beneficial to examine some cases decided on this matter by the courts.

[16] In *Ngooi Ku Siong & Anor v Aidi Abdullah* the plaintiff sustained facial and neck injuries, a compound fracture and minor bruises. He suffered permanent hoarseness and weakness in his voice. Prior to the accident, he was an administrative officer on probation. After the accident, he did not return to work and this implied that his service was terminated. Since he had an ambition to become a pilot he applied to Malaysian Airlines System for a job as a trainee pilot but failed. He then enrolled himself in a local flying club where he secured a private pilot licence. According to the flight examiner from the Department of Aviation who tested him for the private pilot licence, the plaintiffs chances of obtaining a commercial pilot licence is slim due to the hoarseness of his voice. The Federal Court found that apart from his academic qualification and the clocking in of the minimum required number of flying hours, the plaintiff was still required to pass his examination and medical test before he could be a commercial pilot. For these, the Federal Court ruled that the plaintiff has failed to prove real and substantial loss in order to be awarded loss of future earnings.

[17] In *Lim Eng Kay v Jaafar bin Mohamed Said* [1982] 2 MLJ 156, the plaintiff was a trained school teacher. While he was undergoing a course in social science at a local university he met with an accident where he sustained severe brain injury resulting in his lost of ability to concentrate. Though he resumed his university study after the accident, he was forced to drop out due to this handicap. He attempted to give private tuition but quit after a week for failing to concentrate. Since then he remained unemployed. The Federal Court in allowing the award for loss of future earnings has this to say:

> the basis of allowing these damages is the reasonable certainty that the respondent would have been earning the salaries of a graduate teacher had it not been for the injuries he received and the certainty that he would have gone back to teach at least as a non-graduate teacher if he had failed to obtain an academic qualification.

[18] In *Tay Tong Chew & Anor v Abdul Rahman bin Haji Ahmad* [1985] 1 MLJ 50, the plaintiff sustained posterior dislocation of his left hip and closed fractures of his left tibia and fibula as a result of an accident. As a result of the restriction of his hip movement, he could not jog or partake in any games involving running. He also suffered 5 cm shortening of his left limb. He was 23 years of age and had intended to join the Malaysian Administrative & Diplomatic Service (PTD in Bahasa Malaysia). Though he was called for an interview by PTD, he was not successful. He then joined the National Archives which paid him a lower salary with lesser prospect of promotion than PTD. A member of the Public Service Commission who interviewed him for the PTD job testified that because of the plaintiffs physical disabilities - as he was limping badly- he was rendered unfit for acceptance into PTD. Despite this, the Federal Court rejected the plaintiffs claim for loss of future earnings on the ground that 'it is not unreasonable to conclude that the respondent's limping could not have been the cause of his rejection by the Public Service Commission... We accordingly find loss of future earnings had not been proved on balance.

[19] During the trial in the Sessions Court on 24 April 2001, the plaintiff testified that since the motor accident she no longer worked as a domestic maid. She claimed that:

> saya tak boleh kerja lagi. Saya tunggu kes ini habis dan akan balik ke Indonesia. Sekarang saya dah tidak ada permit kerja lagi. Selepas kemalangan permit saya dibatalkan dan majikan saya telah ambil perkerja baru. Sekarang saya tak upaya buat kerja lagi macam dahulu.

In short all that she said was that after the accident she could no longer work, her work permit expired and her former employer had taken a new maid. She also said that she does not have the ability to work like before.

[20] Her previous employer also testified during the trial. But all that he said of relevance to this issue is that after the accident, the plaintiff no longer worked for him, she could not walk because her leg was fractured, and that her work permit was not renewed. For this, he has taken a new maid.

[21] This evidence, in my view, offers very little indication as to the physical ability of the plaintiff to work in the future. I agree that immediately after the accident she was unable to work as a domestic maid. How could she when she was still recovering from the injuries she sustained. Further, it is also true that she could not seek any other employment without a work permit in this country. But here what is important is her ability to work in future either here or back in Indonesia. Could she still work in a job that equals her pay before the motor accident or would she be likely to get less? From what is disclosed of her medical condition, she is not totally immobile or suffering from some severe permanent impairment that would restrict her movement to the extent that she can neither work nor is forced to seek a job that pays her less than what she was receiving before the accident. Without reasonable certainty as to her inability to secure a job in the future or that she would be receiving less than what she got before the accident, this claim of the plaintiff for loss of future earning must fail. The fact that she was not given an extension in her last employment due to the motor accident resulting in her work permit not being renewed is only a factor for the consideration in awarding loss of future earnings. But this alone is insufficient. The plaintiff is required to prove real substantial loss with reasonable amount of certainty and towards this, she failed. For reasons aforesaid, I hold the view that this claim for loss of future earnings should be refused.

Loss of earning capacity

[22] As Mr S Sivanesan has requested this court to consider awarding a sum for loss of earning capacity in the event that the plaintiff is unsuccessful in her claim for loss of future earnings, I would start by citing a passage of the law on this subject from Federal Court judgment in *Ngooi Ku Siong & Anor v Aidi Abdullah*, it reads:

> In the absence of such evidence (to prove loss of future earnings) if the court is satisfied that the plaintiff has suffered a loss of earning capacity, he will be awarded a sum as part of the general damages for his disability suffered as a result of the injuries sustained, instead of compensation for loss of future earnings. It arises where there is a residual risk that the plaintiff might be thrown out of work altogether at some future date. The risk must be real and not speculative or fanciful.

And in another Federal Court case of *Yang Yap Fong & Anor. v Leong Pek Hoon & Anor* [1987] CLJ (Reprint) 419; [1987] 2 MLJ 201, the head note in the law report states:

> The proper test to be applied (for loss of earning capacity) is whether some time in the future, due to the effect of the injuries sustained by him, the plaintiff will face a substantial risk of either losing his job or getting a less paid employment. It does not matter whether the plaintiff was in employment or not at the time of the trial so long as the Court is satisfied from evidence that there is a real or substantial risk that his earning capacity will be affected in the future.

[23] From the above authorities, it is explicit that before an award of this nature can be entertained, there must be evidence to show that the plaintiff will face a real or substantial risk in her earning capacity being affected in the future due to the disability she sustained from the motor accident. The medical report did say that the plaintiff will suffer a permanent limp of her left leg which may prevent her from standing and walking for long periods. This would certainly be a handicap but is not a complete impairment to prevent her from performing other tasks. But since her starting job level was only that of a domestic help, the prospect of her getting another job that would pay her the same as what she was earning before the motor accident is low. In my view, her physical shortcoming will expose her to receiving less in the future than what she obtained before the accident. Mr S Sivanesan has submitted a sum of RM60,000 for this head of damages. I think this is far too excessive. It would be fairer if a sum of RM20,000 is awarded to the plaintiffs loss of earning capacity.

CONCLUSION

[24] In conclusion, I would allow this appeal with no order as to costs. The order of the High Court dated 31 May 2002 should be set aside and the order of the Sessions Court dated 27 August 2001 affirmed with a sum of RM20,000 for loss of earning capacity added to form part of general damages with interest thereon at 8% per annum from date of service of summons to date of realization. Deposit for this appeal to be returned to the appellant.

[25] My brother Abdull Hamid Embong and sister Zainun Ali JJCA have read this judgment in draft and have concurred with the contents herein.

Abdull Hamid Embong JCA:

[26] I have read the judgment in draft of my learned brother James Foong JCA and I am in agreement with my learned brother's finding that a sum of RM20,000 be awarded to the plaintiff as general damages for her loss of earning capacity. I too would allow this appeal with no order as to costs.

[27] As for the preliminary objection raised by the defendants that this appeal by the plaintiff should have been filed and heard separately, and not as was done here, filed as a cross appeal and heard simultaneously with the defendants' appeal on liability, I find no flaw arising from the action taken by the plaintiff to file a cross appeal. As was explained by learned counsel for the plaintiff, the defendants had earlier filed an appeal against the finding of liability by the learned sessions judge, even before the plaintiff could file his appeal on the quantum awarded. Under that situation the plaintiff may rightly act under O 55 r 3 of the Rules of High Court 1980 and file a cross appeal within seven days, which was duly done.

[28] In essence a cross appeal although tagged to the defendants' initial appeal operates as an independent appeal and the appellate court may rehear both the appeals together. In fact to file a cross appeal under O 55 r 3 of the Rules of High Court 1980 as was done by the plaintiff here was quite regular and ultimately be a time and cost saving exercise. The objection taken by the defendants on this matter is thus without merit and should be dismissed.

Appeal allowed in part.

Reported by Brendan Navin Siva